



LAKSHMI DHIKTA V. NEPAL

For years, Nepal banned abortion under any circumstance, and did not explicitly permit it even to save a woman's life. Women were routinely thrown into prison for having abortions, and many died from unsafe abortion procedures. In 2002, the Center for Reproductive Rights (the Center) and the Forum for Women, Law and Development (FWLD) published a report showing that the criminal ban violated women's human rights.¹ The findings were used both to lobby lawmakers to amend the ban and to mobilize civil society to secure the release of women imprisoned for abortion. As a result, the Nepalese government eventually pardoned over fifty women for their alleged crimes. In September 2002, abortion was decriminalized under the following circumstances: within the first twelve weeks of pregnancy; within eighteen weeks on grounds of rape or incest; and any time during pregnancy where a mother's physical or mental health or life is at risk, or in cases of fetal impairment.

Case History

Despite the change in the legal status of abortion, multiple barriers have prevented women from accessing abortion services. In 2007, FWLD, Pro-Public, and a group of human rights lawyers filed a public interest case before the Supreme Court of Nepal to address the unaffordability of abortion services, among other issues.² The case centers on **Lakshmi Devi Dhikta**, an extremely poor woman from the far-western region of Nepal, who had already had five children when she became pregnant for the sixth time. She and her husband knew that having another child would be financially strenuous and would take an additional toll

Why this case is important

Nepal's previous abortion law was one of the most restrictive and harshly implemented in the world. After years of pressure from health activists and civil society groups, the government amended the *Muluki Ain*, Nepal's Country Code, in 2002 to permit abortion. While these amendments represented a major victory for women's rights and were hailed as an important health measure, it soon became clear that additional steps would be needed to ensure women's practical access to safe abortion services. **Lakshmi Dhikta v. Nepal** is the first case to be decided by a national supreme court that holds a government accountable for failing to ensure the affordability of abortion services, and instructs the government to take steps to guarantee that no woman is denied an abortion solely on financial grounds. The Supreme Court's decision is monumental in its unequivocal recognition of abortion as a woman's fundamental right and its delineation of states' positive obligations to ensure this right.

on Lakshmi's health, so they requested an abortion at a government hospital. There, they were asked to pay 1,130 rupees (about USD 14.46) for the procedure. The Dhiktas did not have enough money to pay this fee, and Lakshmi had no choice but to continue the unwanted pregnancy.

Decision Highlights

The Supreme Court's decision anchors the right to abortion squarely within Nepal's constitutional framework and international law and jurisprudence.³ It provides a liberal and unprejudiced view of women's reproductive rights that is firmly grounded in the reality of women's reproductive lives, their socio-economic status, and other fundamental human rights.

Government Must Guarantee Access to Safe and Affordable Abortion Services. The Court makes clear that women's right to abortion can be realized only if the procedure is accessible and affordable. The Court emphasizes the government's obligation to ensure that no woman is denied a legal abortion just because she cannot pay for it and describes women's inability to obtain an abortion because of costs as "unjust."⁴ In addition to being a health concern, access to abortion services is a matter of women's rights and social justice.

Right to Abortion an Essential Component of Reproductive Rights. The Court states that a government cannot recognize reproductive rights generally and yet deny access to abortion. Reproductive rights include the right to terminate a pregnancy and the right to protect a pregnancy; the right to abortion is applicable in cases of unwanted pregnancy or in difficult circumstances. Reproductive rights cannot be understood as imposing an obligation to reproduce.

Forced Pregnancy Violates Women's Fundamental Human Rights. The Court recognizes the inextricable link between the right to abortion, the right to equality, and the right to freedom from discrimination. Just as the law does not force a man to use his body in certain ways, it should not force a woman to use her body in ways she does not want. As the Court notes, "[a] woman is the master of her own body."⁵ Further, the Court recognizes that denying legal abortion results in forced pregnancy and childbirth. This, in turn, causes irreparable harm to women and violates many of their fundamental human rights, particularly the right to freedom from violence. The Court also affirms a woman's right to privacy in matters of abortion by describing pregnancy as a woman's personal matter that warrants legal protection.

Fetus Does Not Have Legal Status of a Human Life. The Court explains that since there is no universal consensus defining when life begins, and because Nepalese law does not acknowledge fetal rights, the Court does not recognize the fetus as a human life. Further, since the fetus cannot exist without a mother, fetal interests cannot supersede the protection of a woman's physical and mental health and well-being. A fetus assumes the status of a child only when born alive. The Court explains that the recognition of any right before birth would

Reproductive rights are an inseparable part of women's human rights and within those the right to abortion holds an important place.

violate a myriad of women's fundamental human rights. Its decision cites *Roe v. Wade*, noting that the U.S. Supreme Court did not recognize the fetus as a human life. It also cites decisions from the constitutional courts of South Africa and Austria holding that a fetus could not be recognized as a person.

Comprehensive Abortion Law Needed to Fully Protect Women's Rights. The legal provisions for abortion currently reside in the *Muluki Ain*, Nepal's Country Code, in the chapter on homicide. Punishments for crimes against human life, such as murder, are also found in this section, implicitly identifying abortion as a crime akin to murder. The Court establishes that a woman's reproductive legal capacity cannot be used against her and can in no way be a ground to punish her. Because the fetus does not constitute a human life, legal provisions on abortion must be contained in a separate law and disassociated from discussions of murder.

Compensation Warranted for Women Forced to Carry Unwanted Pregnancies. Noting the irreparable harm that women suffer when forced to carry an unwanted pregnancy to term, the Court recognizes compensation as being justified in cases where women are unable to obtain an abortion. It references two of the Center's cases, *Tysiāc v. Poland* and *Paulina v. Mexico*, both of which sought and successfully obtained compensation for their plaintiffs.

Implementation

The Center and a host of organizations, including Nepal's National Women's Commission and FWLD, are leading efforts to implement the decision. A key step has been the development and hand-over of a draft comprehensive abortion bill to the Ministry of Health and Population in April 2014, that aims to codify the legal principles recognized in the decision.

* The information contained herein is based on a translation of the Supreme Court's decision.

Endnotes

¹ THE CENTER FOR REPRODUCTIVE LAW AND POLICY AND FORUM FOR WOMEN, LAW AND DEVELOPMENT FUND, ABORTION IN NEPAL: WOMEN IMPRISONED (2002), available at http://reproductiverights.org/sites/crr.civicaactions.net/files/nepal_2002_0.pdf.

² *Lakshmi Dhikta & Others v. Government of Nepal*, Writ No. 0757, Jestha, 2066 (2009) (Supreme Court of Nepal). (Melissa Upreti, Regional Director for Asia at the Center for Reproductive Rights was a co-petitioner in the case.)

³ The decision in this case was issued by Honorable Justice Kalyan Shrestha and Honorable Justice Rajendra Prasad Koirala of the Nepal Supreme Court.

⁴ *Id.* at 31.

⁵ *Id.* at 17.